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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TENNESSEE, JAMES E. WORD, COMMISSIONER, TENNESSEE DEPARTMENT OF HEALTH AND ENVIRONMENT, and the TENNESSEE WILDLIFE RESOURCES AGENCY,

Petitioners,

VS.

CHAMPION INTERNATIONAL CORPORATION, d/b/a CHAMPION PAPERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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QUESTION PRESENTED

Does the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.*, preempt the inherent police authority of the States to control the pollution of their waters from out-of-state sources?

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Petitioners,

vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

The petitioners, the State of Tennessee, its Commissioner of Health and Environment, and the Tennessee Wildlife Resources Agency, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Tennessee entered in this proceeding on April 21, 1986.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court (reprinted in the Appendix at A.1) is reported at 709 S.W.2d 569 (Tenn. 1986). The Opinion of the Tennessee Supreme Court reviews an opinion of the Tennessee Court of Appeals (reprinted in the Appendix at A. 23) which is reported at 22 Env't.Rep.Cas. (BNA) 1338 (Tenn. App. 1985).

JURISDICTION

The Judgment of the Supreme Court of Tennessee was entered on April 21, 1986, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* Applicable portions of the Act, 33 U.S.C. § 1251(a) and (b) and § 1370, are reprinted in the Appendix at A. 34.

The Tennessee Water Quality Control Act of 1977, as amended, T.C.A. § 69-3-101 *et seq.* Applicable portions of the Act, T.C.A. § 69-3-105(a)(1), § 69-3-114, § 69-3-115(a)(1), and § 69-3-117, are reprinted in the Appendix at A. 36.

Rule No. 1200-4-4-.01(10), *Official Compilation, Rules and Regulations of the State of Tennessee,* is reprinted in the Appendix at A. 39.

STATEMENT OF THE CASE

At issue in this case is whether federal law preempts Tennessee's police power authority to abate the severe pollution of a Tennessee waterway, the Pigeon River, caused by a North Carolina papermill. The Pigeon River originates in the mountains of Western North Carolina and flows westward across the Tennessee/North Carolina border, then weaves its way through 26 miles of the scenic Smoky Mountain Region before merging into the French Broad River and Douglas Reservoir. The source of the Pigeon River's pollution is a dark, odorous effluent discharged from a papermill operated by Champion International Corporation (hereinafter Champion) on the banks of the Pigeon River in Canton, North Carolina. Upstream from the

Champion mill, the Pigeon River is a premier trout and bass fishing river. Downstream, below the mill and into Tennessee, the Pigeon River is a foamy, smelly, and murky waterway, which supports minimal aquatic life. For all intents and purposes, the Pigeon River is useless to the citizens of Tennessee.

On July 8, 1983, Tennessee sued Champion in the Tennessee Chancery Court, under the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-101 *et seq.*, and the law of public nuisance, for civil penalties and injunctive relief to abate Champion's pollution of the Pigeon River in Tennessee.[1] Champion moved to dismiss the Complaint. It argued that the Court lacked subject matter jurisdiction because Tennessee law, as to the regulation of discharges into Tennessee waters from out-of-state sources, was preempted by the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* (hereinafter CWA). Champion claimed that as long as it held a valid permit under the CWA issued to it by North Carolina, it was immune from any action by Tennessee in the Tennessee Courts.[2]

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[1] The Tennessee Water Quality Act requires the Tennessee Water Quality Control Board to "classify all waters of the state and adopt water quality standards pursuant to such classifications." T.C.A. § 69-3-105(a)(1); A. 36. It is illegal to discharge into Tennessee waters in violation of these established standards. T.C.A. § 69-3-114(b); A. 37. Such illegal discharges are subject to abatement by injunction, T.C.A. § 69-3-117; A. 38, and/or civil penalties. T.C.A. § 69-3-115(a)(1)(A); A. 37. The Pigeon River is classified as potentially suitable for industrial use, livestock watering, recreation, irrigation, and capable of supporting significant fish and other aquatic life. Rule No. 1200-4-4-.01(10), *Official Compilation, Rules and Regulations of the State of Tennessee;* A. 39. The dark color, odor, foam, and concentration of dissolved solids in the Pigeon River caused by Champion's discharge violates Tennessee's legal limits for these pollutants and renders the Pigeon River unfit for any of its classified uses.

[2] The CWA requires all entities who discharge into the navigable waters of the United States to obtain a National Pollution Discharge Elimination System (NPDES) permit from the Environmental Protec-

The Tennessee Chancery Court denied Champion's Motion to Dismiss and, in a subsequent interlocutory appeal, the Tennessee Court of Appeals affirmed. *State v. Champion International Corp., reported at* 22 Env't.Rep.Cas. (BNA) 1338 (Tenn. App. 1985); A. 23. The Court of Appeals bottomed its ruling on the well-established presumption against federal preemption of state police power. Such a presumption can only be overcome by the unmistakable, clear and manifest purpose of Congress. 22 Env't.Rep.Cas. at 1340; A. 28. The Court found that " '[a]n ordinary and reasonable reading of the [CWA]' can lead to but one conclusion and that is, it 'does not preempt the State of Tennessee from bringing. . . [suit]. . ..' " 22 Env't.Rep.Cas. at 1342; A. 33. Indeed, the Court, *id.*, A. 32, cited 33 U.S.C. 1370(2), which addresses the state's right to police its "boundary waters". That section provides:

> Except as expressly provided in [the CWA], nothing in [the CWA] shall. . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

The Tennessee Supreme Court, in a subsequent appeal, reversed the Court of Appeals in a 4-1 decision. *State v. Champion,* 709 S.W.2d 569 (Tenn. 1986); A. 1. In dismissing the State's suit,[3] the Supreme Court found that the CWA had

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tion Agency in accordance with standards set by the Administrator of the agency. 33 U.S.C. § 1342(a). The Administrator can, however, "authorize" a state to issue NPDES permits in his stead if the state permitting program is at least equal to that under the CWA. 33 U.S.C. § 1342(b). Thus, a discharge permit issued by an "authorized" state satisfies both the federal NPDES permit requirement and the state law permit requirement of the issuing state. Both Tennessee and North Carolina are authorized to issue federal NPDES permits in accordance with 33 U.S.C. § 1342(b).

[3] The Tennessee Chancery Court and Court of Appeals treated Champion's Motion as one for dismissal of Tennessee's Complaint under Rule 12.02(1) and (6) of the Tennessee Rules of Civil Procedure. The Supreme Court noted that Champion filed an Affidavit with its

preempted Tennessee's law in regulating pollution of its waters from out-of-state sources. The majority opinion relied heavily on a decision of the United States Court of Appeals for the Seventh Circuit which resolved the preemption question primarily on public policy considerations. *See Illinois v. City of Milwaukee,* 731 F.2d 403 (7th Cir. 1984), *cert. denied sub nom. Scott v. City of Hammond,* 469 U.S. ____, 105 S.Ct. 979 (1985).

In a vigorous dissenting opinion, Justice Drowota rejected the majority's finding of preemption as contrary to law, fundamentally unfair, and an affront to our federal system of government. *See generally State v. Champion, supra,* 709 S.W.2d at 576 (Drowota, J., dissenting); A. 14. Like the Court of appeals, Justice Drowota found nothing in the CWA to evidence Congress' intent to preempt application of state law to abate water pollution from out-of-state sources. To do so in this case, according to Justice Drowota, would, in effect, allow North Carolina to "dictate" water standards for the Pigeon River in Tennessee. *Id.;* A. 15. Justice Drowota saw this as wholly unfair to "the residents, wildlife, and other resources of Tennessee. . . primarily damaged by the contamination of the Pigeon River." *Id.*[4]

Motion which, therefore, should have been treated as a Motion for Summary Judgment under Rule 56 of the Tennessee Rules of Civil Procedure. 709 S.W.2d at 570, n. 1; A. 2. The Court found that the motion for summary judgment was well-taken and should have been sustained. *Id.,* at 576; A. 13.

[4] On the other hand, Justice Drowota saw Tennessee's regulation of Champion as being neither unfair nor unforeseen:

> The Pigeon River is clean above Champion's manufacturing facility, but it is fouled below it; no other source of pollution lies along its banks between Champion and the flow of the river into Tennessee. Champion is a privately held corporation; it does business in Tennessee and owns land in this State; it would for most other purposes be subject to the jurisdiction of Tennessee courts. How does Champion differ from any other out-of-state tortfeasor subject to the longarm jurisdiction of a state? Exercis-

Finally, Justice Drowota points out that preemption of state law in circumstances as those before the Court upsets the delicate balance of power carefully crafted into our federal system to protect the interests of the individual states. The powers of the sovereign states preserved by the Tenth Amendment — such as the right to control pollution of their waters — cannot be destroyed by Congress. Preempting Tennessee law in this case reduces Tennessee, in Justice Drowota's opinion, to "an administrative arm of the Federal Government." *Id.*, at 579; A. 21.

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ing jurisdiction over Champion is neither unfair nor unforeseeable. Many interstate corporations must comply with the diverse laws and regulations of numerous states. . .. Tennessee must bear the costs of dealing with the pollution of the Pigeon River, which costs could be somewhat off-set by an award of damages or even wholly alleviated by an injunction.

709 S.W.2d at 576 (Citations omitted); A. 15.

REASONS FOR GRANTING THE WRIT

The Court Needs To Decide This Case In Tandem With *International Paper Company v. Ouellette,* S.Ct. No. 85-1233, *Cert. Granted* March 24, 1986, To Enhance The Court's Resolution Of The Important Issue Identical To Both Cases And To Ensure That This Tennessee Case Will Not Escape The Impact Of The Court's Ultimate Ruling On That Issue.

This Petition for a Writ of Certiorari to the Supreme Court of Tennessee presents the identical issue which the Court has decided to hear in *International Paper Company v. Ouellette,* S.Ct. No. 85-1233, *cert. granted* March 24, 1986.[5] Nevertheless, issuing a Writ of Certiorari to the Tennessee Supreme Court in this case and hearing it in tandem with *Ouellette* will produce two significant results. First, the context within which the Tennessee case is presented to this Court will enhance the Court's ability to resolve the significant issue common to both cases. The Tennessee Supreme Court's decision places squarely before this Court the ability of the various states to administer and enforce regulatory programs to abate the pollution of their waters from out-of-state sources. The great majority of states, including Tennessee, have similar, sophisticated water pollution control programs "authorized" by the federal government to implement the CWA in their respective jurisdictions. *See, e.g.,* 48 Fed.Reg. 45,597, chart at 45,598 (Oct. 6, 1983); A. 39. Under such programs, these states have assumed primary responsibility for preventing the pollution of the waters of the United States. *See* 33 U.S.C. § 1251(a) and (b); A. 34. With few exceptions,

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[5] In *Ouellette,* the Court will review a decision of the United States Court of Appeals for the Second Circuit which held that Congress, under the CWA, authorized the application of Vermont common law to abate pollution of Vermont waters caused by a New York papermill. This Petition asks the Court to review a decision of the Supreme Court of Tennessee which — contrary to the result reached by the Second Circuit — held that the CWA preempted application of Tennessee's water quality law to abate the pollution of a Tennessee river by a North Carolina papermill.

these states, due to their geographical juxtaposition are touched by interstate waterways and are subject to out-of-state sources of pollution.

The keen interest of the states in the question presented by *Ouellette* and this Petition is evidenced by the 13 states, including Tennessee, which filed an *amici* brief with this Court on June 27, 1986 in *Ouellette.* By granting this Petition and hearing it in tandem with *Ouellette,* the Court will ensure that the states will have the Court's full benefit and guidance on a question of utmost importance to them.

Secondly, by agreeing to review the Tennessee Supreme Court's decision, this Court will prevent the Tennessee decision from becoming final. This will ensure that this Court's eventual ruling on the question common to both *Ouellette* and the Tennessee decision will impact the Tennessee case. On the other hand, if the Tennessee decision is not acted upon by this Court, it could become a final adjudication as to the parties and issues in the case.[6] As such, under the doctrine of *res judicata,* it could bar any further enforcement actions by Tennessee against Champion under Tennessee's water quality law regarding Champion's *past* pollution of the Pigeon River.[7]

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[6] In order to forestall the finality of the Tennessee Supreme Court's decision, Tennessee has requested, simultaneously with the filing of this Petition, that the Tennessee Supreme Court "recall" its mandate issued in this case on April 30, 1986. Such recall is specifically authorized by Rule 42(c) and (d) of the Tennessee Rules of Appellate Procedure. Tennessee has asked the Tennessee Supreme Court to hold the issuance of the mandate in abeyance until this Court agrees to hear and resolve this case, or until a decision is rendered in *Ouellette.* At the time of the filing of this Petition, the Tennessee Supreme Court has not ruled on Tennessee's request.

[7] Since Champion's pollution of the Pigeon River is continuous and ongoing, it is daily giving rise to a new cause of action. Tennessee would not, therefore, be barred by the doctrine of *res judicata* from enforcement actions against Champion for pollution of the Pigeon River taking place after the present action was filed.

Furthermore, several courts in similar contexts have ruled that this bar would remain even if a subsequent decision by this Court in *Ouellette* implicitly reversed the Tennessee Supreme Court's decision. *See, e.g., Stewart Securities Corp. v. Guaranty Trust Co.*, 597 F.2d. 240 (10th Cir. 1979); *Eaton v. Weaver Mfg. Co.*, 582 F.2d 1250 (10th Cir. 1978); *Barzin v. Selective Service Local Bd. No. 14*, 446 F.2d 1382 (3rd Cir. 1971); *Clouatre v. Houston Fire & Cas. Co.*, 229 F.2d 596 (5th Cir. 1956). Such an unfortunate and unfair result can be avoided by this Court either granting Tennessee's Petition for Certiorari and deciding the Tennessee case in tandem with *Ouellette* or, in the alternative, reserving a decision on Tennessee's Petition until such time as the Court has ruled in the *Ouellette* case.

CONCLUSION

For reasons set forth above, the petitioners respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Tennessee Supreme Court entered April 21, 1986, to determine whether the CWA preempts the application of Tennessee law to abate pollution of Tennessee waters from out-of-state sources. The petitioners respectfully request the Court to decide this case in tandem with *International Paper Co. v. Ouellette,* S.Ct. No. 85-1233, *cert. granted* March 24, 1986. In the alternative, Tennessee requests that the Court withhold a ruling on this Petition pending a decision in *Ouellette, supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Tennessee have been forwarded to Mr. Charles H. Warfield, FARRIS, WARFIELD & KANADAY, 17th Floor, Third National Bank Building, Nashville, Tennessee, 37219, via first-class U.S. Mail, postage prepaid, on this the 16th day of July, 1986.

FRANK J. SCANLON
Deputy Attorney General

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

For Publication
April 21, 1986

Davidson Equity
S/Ct No. 85-36-I
Hon. Irvin H. Kilcrease,
Chancellor.

State of Tennessee, James E.
Word, Commissioner, Tennessee
Department of Health and
Environment, and the Tennessee
Wildlife Resources Agency,
Plaintiffs/Appellees,

vs.

Champion International
Corporation, d/b/a Champion
Papers,
Defendant/Appellant,

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OPINION

REVERSED AND DISMISSED. HARBISON, J.

Appellant operates a paper mill at Canton, North Carolina. It discharges chemical waste therefrom into the Pigeon River at a point several miles inside the borders of the State of North Carolina. Prior to 1981 it held valid permits from the State of North Carolina issued pursuant to and in conformity with the laws of that state as authorized by the Federal Water Pollution Control Act Amendments of 1972 (herein "FWPCA"), 33 U.S.C. §§1251 *et seq.* Appellant duly applied for renewal of its permit in 1981, and administrative proceedings with reference to that renewal were pending when the present action was brought in July 1983.

In this action the State of Tennessee and certain of its environmental officials sought an injunction and civil penalties pursuant to Tennessee statutes and common law, alleging that the effluent from appellant's plant had polluted the Pigeon River below the point of discharge and throughout the course of the river in Tennessee.

Both the Chancellor and the Court of Appeals held that this action could be maintained and overruled a motion for summary judgment filed by appellant.[1] The action was brought in a Tennessee state court at Nashville. Appellant is qualified to do business in the State of Tennessee and owns large tracts of land therein, so that it is generally subject to the jurisdiction of the courts of the state.

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[1] Appellant actually filed a motion to dismiss pursuant to T.R.C.P. 12.02(1) and (6). In support an affidavit and detailed exhibits were filed, all of which were considered by the courts below, so that the motion should have been treated as one for summary judgment pursuant to Rule 56, T.R.C.P. insofar as it was based upon T.R.C.P. 12.02(6). No counter affidavits or other opposing evidence was offered by appellees.

After careful consideration of the issues, we are of the opinion that the motion for summary judgment was well taken and should have been sustained. Accordingly we reverse and dismiss.

There is no dispute as to any material facts. The question presented is whether or not the state and its officials may, under controlling federal authorities, maintain an action in local state courts under local law against a permit holder discharging effluent into interstate waters, the point of discharge being outside the territorial boundaries of the plaintiff. In our opinion neither the federal statutes nor the state statutes relied upon by appellees authorize such an action.

In their complaint appellees invoke state court jurisdiction pursuant to T.C.A. §§ 69-3-115 and 117(c) and T.C.A. § 29-3-102. The latter has to do with the abatement of public nuisances generally. The first two sections are portions of the state "Water Quality Control Act of 1977."

The latter is a detailed statute recognizing that the waters of the state are held in public trust and that the people of the state have a right to unpolluted waters. One of the declared purposes of the statute was to abate existing pollution of state waters, to reclaim polluted waters, to prevent future pollution and to plan for future use of state waters so that the water resources of the state might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters.

One of the specific purposes of the Act was:

> ". . . to enable the state to qualify for full participation in the national pollutant discharge elimination system established under Section 402 of the Federal Water Pollution Control Act, Public Law 92-500."[2] T.C.A. § 69-3-102(c).

---

[2] 33 U.S.C. § 1342.

The statute provides a comprehensive scheme for the control of pollution of the waters of the state, the latter being defined as:

> ". . . any and all water, public or private, on or beneath the surface of the ground, which are contained within, flow through, or border upon Tennessee or any portion thereof . . . ."

except water confined to private property. T.C.A. § 69-3-103(28).

The statute creates an administrative agency with numerous duties pertaining to the quality and purity of waters within the state. This agency is authorized to issue permits to individuals or companies discharging effluent into state waters. T.C.A. § 69-3-108. The agency is authorized to cooperate closely with the Administrator of the Federal Environmental Protection Agency and "to enter into agreements with other states and the United States relative to prevention and control of pollution in interstate waters." T.C.A. 69-3-107(7)(B).

Discharge permits issued by the Tennessee agency govern discharges from specific point sources. It has been held, however, that federal agencies operating within the state are not subject to the Tennessee discharge permit program where pollution does not result from the discharge of an effluent from a point source, but from another cause such as the existence of a Tennessee Valley Authority dam. *See United States ex rel. T.V.A. v. Tennessee Water Quality Control Board,* 717 F.2d 992 (6th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984).

The portions of the Water Quality Control Act under which this suit was brought authorize penalties for violation of effluent standards or water quality standards established by the Water Quality Control Board. We find nothing in the statute purporting to give the Board authority to impose penalties or to seek an injunction against the holder of a valid discharge permit

issued by the United States Environmental Protection Agency or by an appropriate administrative agency of another state.

It is clear from the Tennessee statute that the General Assembly intended for this state to participate fully in a national program for the control and abatement of pollution. T.C.A. § 69-3-105(h)(1) states:

> "The board shall have and exercise the power, duty, and responsibility to adopt, modify, repeal, and promulgate all necessary rules and regulations for the purpose of establishing and administering a comprehensive permit program that will enable the division of water quality control of the department of public health to be designated by the United States environmental protection agency as authorized to issue permits under the national pollutant discharge elimination system established by Section 402 of the Federal Water Pollution Control Act, Public Law 92-500."

It is clear that the state statutes confer broad authority upon Tennessee officials to control discharge of pollutants within the boundaries of the state, including any rivers and streams forming such boundary. Where the point of discharge lies in another jurisdiction, however, it is necessary to examine federal law and federal authorities to determine whether the state may impose its law upon the holders of valid discharge permits issued by the United States government or by another state pursuant to authority granted by federal legislation.

Prior to the adoption in 1972 of the FWPCA, the Supreme Court of the United States had indicated that state law governed the pollution of interstate or navigable waters. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971). In 1972, however, shortly before adoption of the FWPCA, the Court held otherwise and overruled its contrary indication in the *Wyandotte* case, *supra*. It expressly held that federal common law, rather than internal state law, must govern in actions to

abate nuisances or control pollution in interstate waters. *Illinois v. Milwaukee,* 406 U.S. 91, 102 n.3 (1972).

Shortly after the release of the opinion in that case, the federal legislation now known as the Federal Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.* was adopted by the United States Congress. Thereafter the Supreme Court of the United States held that the provisions of that statute preempted federal common law in interstate water pollution cases. *Milwaukee v. Illinois,* 451 U.S. 304 (1981). It vacated a decision of the United States Court of Appeals for the Seventh Circuit which had held to the contrary and which had authorized the imposition of more stringent standards of pollution control under federal common law than those required under the recent federal statute.

While in that opinion the Supreme Court of the United States did not expressly consider the question of whether one state could impose its laws and regulations upon the holder of a discharge permit in another state, shortly after the release of its opinion it denied a petition for certiorari filed by the State of Illinois specifically raising that question. *Illinois v. Milwaukee,* 451 U.S. 982 (1981).

Upon remand, the *Milwaukee* case was consolidated in the United States District Court for the Northern District of Illinois with two other cases, and the litigation again reached the Court of Appeals for the Seventh Circuit. That court held that the FWPCA precludes application of one state's common law or statutory law to determine liability and to afford a remedy for discharges within another state. *Illinois v. Milwaukee,* 731 F.2d 403 (1984). Thereafter the Supreme Court of the United States denied certiorari in that case and the other cases which had been consolidated with it. *Scott v. City of Hammond,* ____ U.S. ____, 105 S. Ct. 979, 83 L. Ed. 2d 981 (1985).

We interpret the foregoing authorities to hold that federal legislation is preemptive of both federal common law and state

law in the area of control of pollution in interstate waters and that environmental agencies of one state may not take official action against a permit holder from another state except as authorized by the federal statutes.

While there is some contrary authority, we are of the opinion that this is the better view of the subject. It is clear under the federal statutes that one seeking to discharge effluents into interstate waters need seek a permit only in the state where the discharge originates, and not in other states which may be affected by the discharge. *See Lake Erie Alliance for Protection of Coastal Corridor v. U. S. Army Corp. of Engineers,* 526 F. Supp. 1063 (W.D. Pa. 1981), *aff'd* 707 F.2d 1392 (3rd Cir. 1981), *cert. denied,* 464 U.S. 915 (1983)); *Commonwealth of Kentucky ex rel. Stephens v. U.S. Nuclear Regulatory Commission,* 626 F.2d 995 (D.C. Cir. 1980).

Under these authorities, it is clear that appellant in the present case was not required to seek a discharge permit from the State of Tennessee for its North Carolina paper mill, even though the stream into which the discharge emptied flowed after a course of several miles into the borders of Tennessee. Appellant has not applied for a permit from Tennessee, and has not violated the conditions of any Tennessee permit.

It appears that the contents of the effluent discharged by appellant are such that had the point of discharge been located in this state, a permit would not have been issued without more stringent limitations than those imposed by the State of North Carolina. It further appears, however, that both North Carolina and Tennessee are authorized under the federal statutes to issue permits, and that the effluent standards and limitations of both states meet and exceed the minima required under the federal statutes.

In its second opinion in the Illinois-Milwaukee litigation, the Supreme Court of the United States held that the holder of a Wisconsin permit could not be subjected to more stringent requirements at the suit of another state under principles of

federal common law. As previously stated, the Court later denied a separate petition for certiorari seeking to impose more stringent limitations under the statutory and common law of the complaining state, Illinois.

With reference to the FWPCA of 1972, the Court said:

> "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The 'major purpose' of the Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.' . . . This Court was obviously correct when it described the 1972 Amendments as establishing 'a comprehensive program controlling and abating water pollution.' *Train v. City of New York,* 420 U.S. 35, 37, 95 S. Ct. 839, 841, 43 L. Ed. 2d 1 (1975). The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." 451 U.S. 318-319 (1981). (Emphasis in original.)

The federal legislation prescribes a system for the issuance of permits for discharges at specific point sources as a part of the national pollution discharge elimination system.[3] 33 U.S.C. § 1342(a). Subsection 5 of this section provides in part as follows:

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[3] The term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

> "The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters *within the jurisdiction of such State.*" (Emphasis added.)

In 33 U.S.C. § 1342(b) there are elaborate provisions for state permit programs, and by subsection (c) it is provided that the federal program of permits will be suspended during such time as the state permit program complies with the federal statutory requirements. It is undisputed that both North Carolina and Tennessee have qualified to issue permits under this national program, and that their effluent requirements are equal to or exceed minimum federal requirements. The Tennessee requirements, however, are more stringent than those of North Carolina.

It is clear that state law has not been preempted by the national law, but that it plays an important part in the national program. Each state, however, clearly operates within the sphere of its own jurisdiction, and may not issue permits for or control points of discharge lying within the jurisdiction of other states. The provisions of both the federal and state statutes applicable to this action must be read and construed in light of those basic principles.

The provisions for state permit programs themselves make it abundantly clear that each state is to act with respect to the waters lying within its own jurisdiction, but that it must take cognizance of the flow of waters into other jurisdictions. One of the conditions of approval of a state permit program by the Administrator of the Environmental Protection Agency is that program must:

> ". . . insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application . . . ." 33 U.S.C. § 1342(b)(3).

Further, each state program must:

> ". . . insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing . . . ."
>
> 33 U.S.C. § 1342(b)(5).

The North Carolina permit program meets these requirements, and the record shows that Tennessee officials were participating in the renewal of appellant's permit in North Carolina administrative proceedings at the time the present action was brought.

The federal statutes provide that the federal Administrator has power to deny the issuance of any permit under a state program. 33 U.S.C. § 1342(d)(2).

The federal statutes also provide for civil actions to be brought against any violator of a permit, or against the Administrator, by any person having an interest adversely affected, including a state. 33 U.S.C. § 1365(a). Such actions are to be brought in the judicial district in which the point source of discharge is located. 33 U.S.C. § 1365(c).

The federal statutes also provide:

> "A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in

another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State." 33 U.S.C. § 1365(h).

One United States District Court has disagreed with the conclusions of the Seventh Circuit Court of Appeals in *Illinois v. Milwaukee,* 731 F.2d 403 (7th Cir. 1984) and has held that private citizens of one state may sue an out-of-state polluter under the common law of the state where their property is located, even though the defending party has a valid permit in another jurisdiction. *See Ouellette v. International Paper Co.,* 602 F. Supp. 264 (D. Vermont 1985). This decision was recently affirmed in a memorandum opinion by the Second Circuit Court of Appeals. 776 F.2d 55 (1958) (sic).[4]

The court in that case, like the lower courts in the present litigation, relied heavily upon a general savings clause appearing in the federal legislation contained in 33 U.S.C. § 1370, as follows:

"Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (b) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent

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[4] Certiorari was granted in this case by the Supreme Court of the United States on March 25, 1986. *See* 54 U.S.L.W. 1148.

limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

The Supreme Court of the United States noted the foregoing provision and after quoting it in a footnote said:

> "It is one thing, however, to say that States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance law, and apply them to in-state discharges. It is quite another to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to *out-of-state* dischargers." *Milwaukee v. Illinois,* 451 U.S. 304, 327-328 (1981). (Emphasis in original).

We agree with the following observation of the Seventh Circuit Court of Appeals:

> "However, it seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II. Such a complex scheme of interstate regulation would undermine the uniformity and state cooperation envisioned by the Act. For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered

meaningless. In our opinion Congress could not have intended such a result." *Illinois v. Milwaukee,* 731 F.2d 403, 414 (7th Cir. 1984).

Although its denial of certiorari does not necessarily bind the Supreme Court of the United States to this interpretation of the statutes, we think that that denial, together with its earlier denial of a separate petition by Illinois, predicated upon the application of Illinois law, lends strong support to the construction given by the Seventh Circuit Court of Appeals.

The State in the present case makes a strong argument to the contrary. We have every sympathy with the State and its officials in an effort to abate pollution and to control the contamination of public waters. Nevertheless, the Tennessee General Assembly clearly expressed an intention to join a national program when it enacted the Tennessee Water Quality Control Act of 1977, and we believe that cognizance must be given to the role of other states which have also joined that program. A duly authorized permit from the Environmental Protection Agency or from an authorized state should, and, in our opinion, must, afford some protection to the holder thereof, who frequently has obtained it at enormous expense. The federal statutes contain ample provisions for other states and their citizens to enforce the terms of such permits, if they in fact are not met, and the permit proccess itself affords other states and their officials a significant participating role in the issuance or renewal of discharge permits.

For these reasons we are of the opinion that the motion for summary judgment filed by appellant was well taken and should have been sustained. The judgments of the courts below are reversed and the suit is dismissed at the cost of appellees. The cause will be remanded to the trial court for collection of costs accrued there and any further orders which may be necessary.

/s/ William J. Harbison, Justice

Brock, C.J., Fones and Cooper, J.J., concur;
Drowota, J., files dissent.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

For Publication.
April 21, 1986

DAVIDSON EQUITY

Hon. Irvin H. Kilcrease, Chancellor.

S/Ct No. 85-36-I

State of Tennessee, James E. Word, Commissioner, Tennessee Department of Health and Environment, and the Tennessee Wildlife Resources Agency,

Plaintiffs-Appellees,

v.

Champion International Corporation, d/b/a Champion Papers,

Defendant-Appellant.

DISSENTING OPINION

(Filed April 21, 1986)

After considering the authorities and statutes involved in this difficult case, I have concluded that it should not be dismissed, and I, therefore, respectfully dissent. Under the law of pre-emption, by the terms of these Federal and State Statutes, and pursuant to the reserved power of the State of Tennessee under the Tenth Amendment to the United States Constitution, this State has jurisdiction over a private interstate party with sufficient contacts with the forum and over waters running through its territorial boundaries. *See, e.g.,* 33 U.S.C. §§ 1251(b), 1251 (g), 1365(e), 1365(h), 1370; T.C.A. §69-3-103(28) (Supp. 1985); *Kansas v. Colorado,* 206 U.S. 46, 27 S.Ct. 655 (1907).

In this case, the residents, wildlife, and other resources of Tennessee, and not those of North Carolina, are primarily damaged by the contamination of the Pigeon River. This case is wholly unlike a case involving a national waterway such as the Mississippi or Ohio Rivers or the Great Lakes, where sources of pollution are many and indeterminable. *Cf. Missouri v. Illinois,* 200 U.S. 496, 26 S.Ct. 268 (1906). The Pigeon River is clean above Champion's manufacturing facility, but it is fouled below it; no other source of pollution lies along its banks between Champion and the flow of the river into Tennessee. Champion is a privately held corporation; it does business in Tennessee and owns land in this State; it would for most other purposes be subject to the jurisdiction of Tennessee Courts. How does Champion differ from any other out-of-state tortfeasor subject to the longarm jurisdiction of a state? Exercising jurisdiction over Champion is neither unfair nor unforeseeable. Many interstate corporations must comply with the diverse laws and regulations of numerous states. *See, e.g., Phillips Petroleum Co. v. Shutts,* ____ U.S. ____, 105 S.Ct. 2965 (1985); *Allstate Insurance Co. v. Hague,* 449 U.S. 302, 101 S.Ct. 633 (1981). Tennessee must bear the costs of dealing with the pollution of the Pigeon River, which costs could be somewhat off-set by an award of damages or even wholly alleviated by an injunction.

In effect, the Majority is permitting the State of North Carolina to dictate the policy of this State. As the United States Supreme Court has noted in regard to the sovereign powers of the States under the Tenth Amendment:

> "[No] state can legislate for, or impose its own policy upon the other .... One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its views to none."

Kansas v. Colorado, supra, 206 U.S. at 95-97, 27 S.Ct. at 666-667. By refusing to exercise jurisdiction in this case, the Majority permits the law and policy of North Carolina to remain unfrustrated, but that of Tennessee will be frustrated; whereas, if jurisdiction were exercised, the law and policy of both States would be enforced.

In this regard, I think that it is significant that the State is not suing the State of North Carolina or its political subdivisions but is seeking redress against a private party, Champion, who is subject to the dual jurisdiction of Federal and State Governments (including that of Tennessee as well as that of North Carolina). *Cf. Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.,* 452 U.S. 264, 286, 101 S.Ct. 2352, 2365 (1981). The exercise of State jurisdiction in this case is consistent with Constitutional principles of due process, full faith and credit, and federalism. Moreover, Congress has contemplated such a possibility in the Federal statutory scheme itself. *See, e.g.,* 33 U.S.C. §§1251(b), 1251(g), 1370. *Cf.* 33 U.S.C. §§1365(e), 1365(f).

Lending support to this result, a recent opinion of the United States Supreme Court analyzes the interaction of the States and Congress, noting that "the principal and basic limit on the federal commerce power is that inherent in all congressional action - the built-in restraints that our system provides through state participation in federal governmental action." *Garcia v. San Antonio Metropolitan Transit Authority,* ____ U.S. ____, 105 S.Ct. 1005, 1020 (1985). The Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251, *et seq.,* allows State authority to be substituted for that of the Federal Government, apparently demonstrating the very interaction of State and Federal Governments of which Justice Blackmun conceived in *Garcia, supra. Cf. City of Milwaukee v. Illinois,* 451 U.S. 304, 341, 101 S.Ct. 1784, 1805 (1981) (*Milwaukee II*) (Blackmun, J., dissenting) ("Because the [FWPCA] contemplates a shared authority between the Federal Government and the individual

States . . . it is entirely understandable that Congress thought it neither imperative nor desirable to insist upon an exclusive approach to the improvement of water quality."). Thus, the FWPCA specifically provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 33 U.S.C. §1365(e). *See also Milwaukee II, supra,* 451 U.S. at 328, 101 S.Ct. at 1798 (this section of the FWPCA means exactly what it says). Significantly, the definition of "person" in the FWPCA includes a State. 33 U.S.C. §1362(5).

Nothing I have found in the FWPCA reveals a Congressional intent to establish uniform standards, providing only for minimum standards and encouraging States to go further to achieve the goal of clean water as soon as possible. In this regard, the United States Supreme Court has suggested that uniformity may not be the required result in every case of this nature, having stated that "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee II, supra,* 451 U.S. at 313, 101 S.Ct. at 1790. *Cf. Garcia, supra,* 105 S.Ct. at 1017-1019. Congress has clearly incorporated the exercise of State jurisdiction into the FWPCA:

> "It is the policy of the Congress to *recognize, preserve, and protect the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources...."

33 U.S.C. §1251(b) (emphasis added). *See also* 33 U.S.C. §1370. In my opinion, the entire Federal statutory scheme demonstrates the Congress's intent that the States continue and

even expand the exercise of jurisdiction in these cases to achieve the goal of unpolluted water. Being held to the standards of the State of North Carolina, when it is the State of Tennessee whose interests are most directly affected, defeats the purposes of the Tennessee Water Quality Control Act, T.C.A. §69-3-101, *et seq.*, as well as undermines the structure of the FWPCA. In practice, relegating a State with more stringent standards to the lower standards of a bordering State for the sake of uniformity transforms the minimum Federal standards into the maximum standards for many interstate streams. I think that this result is contrary to the FWPCA and effectively prevents many States from enforcing their higher standards, which are clearly within their authority to enact, on any but their intrastate tributaries.

Furthermore, how any Commerce Clause purposes would be impaired by imposing Tennessee law on Champion is not clear. Champion will have to comply with one and only one standard, since compliance with Tennessee's standard will also comply with that of North Carolina; thus, the policies and laws of both States will be enforced. *Illinois v. City of Milwaukee,* 406 U.S. 91, 92 S.Ct. 1385 (1972) (*Milwaukee I*), foresaw that "a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor." 406 U.S. at 107-108, 92 S.Ct. at 1395. *Cf. Milwaukee II, supra,* 451 U.S. at 341, 101 S.Ct. at 1805 (Blackmun, J., dissenting) ("[U]nder the statutory scheme, any permit issued by the EPA or a qualifying state agency does not insulate a discharger from liability under other federal or state law.").[1] In this case, unwavering conformity to purposeless uniformity does not serve the interests of federalism or of the Commerce Clause. Every case

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[1] Justice Blackmun also reiterated that, as foreseen in *Milwaukee I,* the effect of *Milwaukee II* would be to allow States to resort to their own courts to enforce their more stringent standards on out-of-state polluting parties. 451 U.S. at 353, 101 S.Ct. at 1811.

carries with it its own equities, requiring in some circumstances at least that the State interest be considered as compelling as that of the Federal Government in uniformity.

> "The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else . . . deems state involvement to be."

Garcia, supra, 105 S.Ct. at 1015. *Garcia* then goes on to elaborate on this concept of federalism:

> "[The] Constitution of the United States . . . preserves the autonomy and independence of the States - independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States."

101 S.Ct. at 1017 (citation omitted). Since *Milwaukee II* has abrogated the federal common law in this area, in light of the comprehensive scheme of the FWPCA, and because the FWPCA itself purposefully preserves State common law and statutory remedies, then State jurisdiction over a private interstate party is not pre-empted. I emphasize the facts that in this case the source of pollution is certain, that Tennessee must bear the financial and physical burdens of the pollution, that this State has substantial contacts with Champion, and considering the insubstantial effect on commerce, pre-emption is neither required nor reasonable. *Cf. Hodel, supra,* 452 U.S. at 310, 101 S.Ct. at 2391 (Rehnquist, J., concurring) (emphasizing that these cases involve questions of degree and that the effect on commerce must be substantial to justify federal pre-emption). *Cf. also Equal Employment Opportunity Comm. v. Wyoming,* 460 U.S. 226, 249, 103 S.Ct. 1054, 1062

(1983) (recognizing that considerations of degree are appropriate in some Tenth Amendment cases).

Additionally, Tennessee's case law establishes its own criteria for pre-emption in *State v. Scott*, 678 S.W.2d 50 (Tenn. 1984), which follows the United States Supreme Court's cases in this area. Tennessee jurisdiction over the waters that flow within its borders is a matter within the police powers of the State, and as Justice Rehnquist noted in *Milwaukee II, supra:*

> "[T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question, ' "we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." ' *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed. 2d 604 (1977)."

451 U.S. at 316, 101 S.Ct. at 1792. *Cf. Milwaukee II, supra,* 451 U.S. at 335, 101 S.Ct. at 1802 (Blackmun, J., dissenting) ("Long before the 1972 decision in [*Milwaukee I*], federal common law enunciated by this Court assured each State the right to be free from unreasonable interference with its natural environment and resources when the interference stems from another State or its citizens.") (citations omitted). Consistently with these principles, *Scott, supra,* found that these

> "police powers . . . are not to be pre-empted by federal legislation unless that was Congress' clear and manifest purpose. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 9 L.Ed. 1447 (1947). Pre-emption is compelled only if it is expressly stated in the statute or is implicit in the statute's structure and purpose. *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1892)."

678 S.W.2d at 51. Pre-emption is not clearly or manifestly intended and is not compelled by the structure and purpose of the Federal Statute - on the contrary, the FWPCA contains several provisions that preserve, incorporate, and encourage State jurisdiction.

Applying the criteria in *Scott, supra,* at 51, for deciding whether pre-emption has occurred in this case, I have concluded that no peculiarly pervasive Federal regulatory program is involved under the terms of the Federal Act itself and that the Federal interest is no more compelling that (sic) that of Tennessee's, especially considering that it is this State's water resource that is at stake. The exercise of Tennessee jurisdiction is wholly consistent with the objectives and obligations of the FWPCA. Requiring Champion to comply with the Federal and State regulations is not physically impossible, since compliance with Tennessee's standards fulfills those of North Carolina as well as those of the Federal Government under the provisions of the FWPCA. Champion will have to comply with only one non-conflicting standard, albeit the higher one. Any need for a uniform standard cannot be disserved by this requirement.

To find that State jurisdiction has been pre-empted in this case reduces the State to an administrative arm of the Federal Government. "The Tenth Amendment was invoked to prevent Congress from exercising its 'power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Garcia, supra,* 105 S.Ct. at 1029 (Powell, J., dissenting). Tennessee is not interfering with the objectives or interests of the State of North Carolina; this State is acting against a private party, and, if it is successful, its action will not only incidentally benefit North Carolina, but it also more fully serves the purposes of the FWPCA to eliminate pollution. Under the Full Faith and Credit Clause of the United States Constitution, North Carolina would be obligated to enforce a Tennessee judgment rendered against a private tortfeasor under its longarm jurisdiction. Moreover, the effect of Tennessee's

action is not substantial upon interstate commerce. *See Hodel, supra,* 452 U.S. at 310-311, 101 S.Ct. at 2391 (Rehnquist, J., concurring). The FWPCA cannot "require the State to abandon [its] goals, or to abandon the public policy decisions underlying them." *Equal Employment Opportunity Comm. v. Wyoming, supra,* 460 U.S. at 239, 103 S.Ct. at 1062. No lack of comity to the State of North Carolina is implied, and I find it incongruous that North Carolina would ever defend as its public policy a right to pollute on the part of Champion.

This State has jurisdiction over the private party and over the subject matter in this case. No Federal interest is impaired or otherwise frustrated; rather, the interests of all - Tennessee, North Carolina, and the United States - are furthered. The State is acting within its legislative authority to achieve its public policy. Substantial State interests are involved in protecting the quality of water within its boundaries, which is a matter of uniquely compelling concern to the people who must use it. In view of the structure of the FWPCA and in the absence of any Federal common law, the exercise of Tennessee jurisdiction is protected by the Tenth Amendment to the United States Constitution. "This [Amendment] is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning." *Kansas v. Colorado, supra,* 206 U.S. at 90-91, 27 S.Ct. at 664. Accordingly, I must respectfully dissent from the opinion of the majority.

/s/ FRANK F. DROWOTA, III,
Justice.

APPENDIX B

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

State of Tennessee;
James E. Word, Commissioner,
Tennessee Department of Health
and Environment; and The Tennessee
Wildlife Resources Agency
Plaintiffs-Appellees

vs.

Champion International Corporation,
d/b/a Champion Papers
Defendant-Appellant

Appealed From The Seventh Chancery Division, Part I, For Davidson County, Tennessee

The Honorable Irvin H. Kilcrease, Jr., Chancellor

Filed: Jan. 15, 1985

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS
JUDGE

DAVIDSON EQUITY

State of Tennessee;
James E. Word, Commissioner,
Tennessee Department of Health
and Environment; and The Tennessee
Wildlife Resources Agency
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vs.

Champion International Corporation,
d/b/a Champion Papers
Defendant-Appellant

OPINION

The issue in this case is whether the Federal Clean Water Act (CWA), 33 U.S.C. §1251 *et seq.*, precludes the application of Tennessee law to abate the pollution of its waters from sources outside of Tennessee.

We adopt the statement of case as set forth in the brief of defendant, Champion International Corporation, d/b/a Champion Papers (Champion), as follows:

> Tennessee filed a Complaint alleging that Champion owns a paper mill at Canton, North Carolina. The Complaint alleges that the mill uses water from the Pigeon River for industrial processes and that following such use, the water is discharged back into the Pigeon River without adequate treatment to protect the Tennessee section of the Pigeon River from pollution. Tennessee alleged that Champion is violating various Tennessee statutes pertain-

ing to water quality standards and that the Pigeon River is polluted by Champion. The Complaint seeks injunctive relief and monetary penalties.

Champion filed a Motion to Dismiss asserting a lack of jurisdiction over the subject matter and asserting that the complaint failed to state a claim upon which relief could be granted. The Chancellor entered an Order denying Champion's Motion to Dismiss. Thereafter, following a decision by the Seventh Circuit Court of Appeals, Champion filed a Motion for a New Trial Or In The Alternative To Alter or Amend the Court's Order denying Champion's Motion to Dismiss The Chancellor entered an Order denying the Motion For New Trial and/or To Alter Or Amend. Champion filed in the Trial Court an Application For Interlocutory Appeal By Permission. The Chancellor granted this Application. The Trial Court's Statement of Reasons was duly filed.

Champion filed an Application with the Court of Appeals for Permission To Appeal under Rule 9, Tennessee Rules of Appellate Procedure. This application was granted by the Court of Appeals on August 21, 1984.

Plaintiffs'[1] complaint alleges that discharges from Champion's paper processing plant located on the Pigeon River in Canton, North Carolina, are polluting the Pigeon River because the discharges are not adequately treated and that as a result, the people of Tennessee are harmed; that, therefore, Champion is violating Tennessee's Water Quality statutes, rules and regulations, and is guilty of creating a nuisance.

The waste water from the Champion plant is discharged into the river at Canton. The Pigeon River flows downstream from

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[1] Plaintiffs are hereafter referred to as Plaintiffs, State, or Tennessee.

the plant and eventually crosses the North Carolina/Tennessee border. From the Tennessee border, the river traverses some twenty-six miles through the Smokey Mountains before it emerges into the French Broad River and Douglas Reservoir.

The Champion plant was issued a National Pollutant Discharge Elimination Systems (NPDES) permit in August of 1977 by the State of North Carolina. Within the appropriate time before expiration, Champion filed an application for renewal of that permit, and another NPDES permit was issued by North Carolina which expired June 19, 1981. Before the expiration of the second permit, Champion again filed an application for renewal of its permit within the proper time, and that application is presently being processed by the State of North Carolina.

The CWA establishes the National Pollution Discharge Elimination System and provides for a nationwide system of permits which are required of all entities which discharge pollutants into navigable waters. 33 U.S.C. § 1342(a); 40 C.F.R. Part 122. The discharge of pollutants without an NPDES permit is illegal and subjects the discharger to various penalties. 33 U.S.C. § 1311(a) and 33 U.S.C. § 1319(a). 33 U.S.C. § 1342(a) gives the authority to administer the NPDES to the Environmental Protection Agency (EPA). However, pursuant to 33 U.S.C. § 1442(b), EPA may authorize the several states to issue discharge permits when it finds that they have in place a discharge permit program at least equal to that promulgated by the EPA pursuant to CWA.

Where a valid state program is found to exist, the federal permit program is suspended, and the issuance of a state discharge permit satisfies the requirements of the federal NPDES permit. The effect of an authorized state discharge permit program is that a discharge permit issued under an authorized state program satisfies both the state law requirements and the federal NPDES requirements. Both Tennessee and North Carolina are

authorized states and, therefore, administer both the federal NPDES program and their own state water pollution programs.

Water quality standards vary from state to state and in many states, exceed the minimum requirements of the federal CWA. The regulations of the Tennessee Department of Health and Environment place limits on the amount of dissolved solids and foam which may be discharged under a permit and the degree to which the water may be colored or an odor created by a discharge. Neither the State of North Carolina nor the Federal Government place such restrictions upon their discharge permits. Tennessee alleges that it is these pollutants, the dissolved solids, foam, odor, and color, discharged by Champion which has destroyed the Pigeon River for any useful purpose.

The United States Congress has enacted various laws pertaining to interstate waters. *Illinois v. City of Milwaukee,* 406 U.S. 91, 92 S.Ct. 1385, [31] L.Ed. 2d 712 (1972). In 1948, the Congress passed the Federal Water Pollution Control Act. 33 U.S.C. § 1161 *et seq.*

"In 1972, prompted by the conclusion of the Senate Committee on Public Works that 'the Federal Water Pollution Control Program . . . has been inadequate in every vital aspect,' Congress enacted the Amendments," which were codified in 33 U.S.C. § 1251 *et seq.* (the "Clean Water Act"). *EPA v. California ex rel. St. Water Res. Control Board,* 416 U.S. 200, 203, 96 S.Ct. 2022, 2024 (1976) (citations omitted).

Responsibility for administration of the CWA was placed on the administrator of the EPA, 33 U.S.C. § 1251.

Tennessee has the power to prevent the pollution of its waters. U.S. Const., Amend. X. Federal preemption of this power takes place only if intended by Congress. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947).

Where the federal and state governments exercise concurrent power, the Supremacy Clause, U.S. Const., art. VI, § 2, acts to preempt state laws only where it is clear that Congress so intended.

"Proper respect, therefore, for the independent sovereignty of the several States requires that federal supremacy be invoked only where it is clear that Congress so intended. Statutes should therefore be construed to avoid preemption, absent an unmistakable indication to the contrary." *Penn Terra Ltd. v. Department of Environmental Resources,* 733 F.2d 267, 273 (3rd Cir. 1984). "We start with the basic assumption that Congress did not intend to displace state law. Where it is argued that Congress intended to withdraw police power from a state, that intention must be unmistakable." *Matter of Quanta Resources Corp.,* 739 F.2d 912, 916 (3rd Cir. 1984); *see Penn Terra Ltd.,* 733 F.2d at 272-273. There is a "presumption against preemption." *Matter of Oswega Barge Corp.,* 664 F.2d 327, 335 (2nd Cir., 1981).

Where it is not clearly stated that state law is preempted, the state law is preserved "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed. 2d 443, 450 (1978).

"[T]he police powers of a state are not to be preempted by federal legislation unless that was Congress' clear and manifest purpose . . . Preemption is compelled only if it is expressly stated in the statute or is implicit in the statute['s] structure and purpose." *Tenn. v. Scott,* 678 S.W.2d 50, 51 (Tenn. 1984).

It is Champion's insistence that the United States Congress, by its enactment of the CWA, precludes the application of Tennessee law to discharges into interstate waters occurring in another state.

In its argument that the CWA has preempted state law relative to regulation of out-of-state sources of pollution, Champion first relies on *Texas v. Pankey,* 441 F.2d 236 (10th Cir. 1971). *Pankey* involved the discharge of pollutants into the New Mexico portion of an interstate river that was alleged to have polluted the Texas portion of the river. The District Court of New Mexico dismissed the suit for lack of jurisdiction. The Tenth Circuit reversed, finding that federal common law existed and, therefore, the District Court had jurisdiction. The *Pankey* Court simply held that federal common law preempted state law in the regulation of out-of-state water pollution. *Pankey* was decided in 1971 before the enactment of the CWA in 1972 and does little to help in our determination of whether the CWA preempts Tennessee law.

Champion next relies on *Illinois v. City of Milwaukee.* 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed. 2d 712 (1972) (Milwaukee I). This case does little more than give the stamp of approval to *Pankey, i.e.,* adopt federal common law in the regulation of interstate waters. In *Milwaukee I,* the Supreme Court held that Congress had not fully addressed the matter of interstate water pollution and that to meet the problem, it was necessary to create a federal common law remedy. The Court went on to state:

> It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creating of a public nuisance by water pollution. While federal law governs, consideration of state standards may be relevant. Thus, a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. There are no fixed rules that govern; these be equity suits in which the informed judgment of the chancellor will largely govern.

406 U.S. at 107, 92 S.Ct. at 1395, 31 L.Ed. 2d at 725-726 (citations omitted).

In *Milwaukee I,* the Court further held that it would not exercise original jurisdiction but that the lower federal courts did have jurisdiction under federal common law.

Illinois then filed suit against the City of Milwaukee in the United States District Court for the Northern District of Illinois under a theory of federal common law nuisance and also sought relief under Illinois statutory and common law. Five months later Congress enacted amendments to the Federal CWA and, as stated by the State, "fashion[ed] the law much as it stands today." Both the District Court and the Seventh Circuit ruled that under the theory of common law nuisance, the City of Milwaukee must take corrective measures to abate the pollution. *Illinois v. City of Milwaukee,* 599 F.2d 151 (7th Cir., 1979). The Court rejected the argument of the City of Milwaukee that the 1972 amendments to the CWA had obviated federal common law in the area of interstate control of water pollution. The City of Milwaukee appealed, and the Supreme Court reversed, holding that Congress, by the passage of the 1972 amendments to the CWA, had exhibited an intent to obviate federal common law in the area of water pollution. *City of Milwaukee v. Illinois,* 451 U.S. 312, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (Milwaukee II). The Court held that insofar as interstate water pollution was concerned, the federal remedy was the CWA and that the federal common law actions created by *Milwaukee I* were no longer available.

The Court specifically declined to rule on Illinois' state law claims, stating that even though Illinois argued these points in its brief, "the issue before us is simply whether federal legislation has supplanted federal common law." The question of whether the CWA preempted state law was left for another day. 451 U.S. at 310, n. 4, 101 S.Ct. at 1789, n. 4, 68 L.Ed.2d at 122, n. 4.

On remand, the Seventh Circuit dealt with this issue. *Illinois v. City of Milwaukee,* 731 F.2d 403 (7th Cir. 1984), holding that the federal CWA was the exclusive remedy to abate interstate water pollution and that Congress had preempted the right of states to regulate interstate water pollution except to the extent that the Act authorizes resort to state law. *Id.* at 411.

The Seventh Circuit starts from the premise that the federal common law remedies created by *Milwaukee I* preempted state law remedies to control interstate water pollution. The Seventh Circuit reasoned that since the Supreme Court in *Milwaukee II* held that the CWA had displaced the judicially created federal common law, the CWA automatically prevented resort to state law remedies. The Court states that this is so because the very reasons for adopting the preempting federal common law dictates a preempting federal statute. We disagree. We do not believe the Supreme Court's reasons for adopting a federal common law can be imputed to the Congress simply because Congress replaced the federal common law with a statute. The CWA itself must be looked to to determine the intent of Congress. We do not believe policy considerations involved in the Supreme Court's creation of the federal common law remedy should be considered.

We agree with the State that the Seventh Circuit's "attempt to explain away two key provisions of the CWA is far from convincing." 33 U.S.C. § 1370 provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political

> subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

The Seventh Circuit concludes that the language of subparagraph (2) simply gives the states jurisdiction over waters inside their boundaries. We are of the opinion that this is a strained reading of this section.

We are of the opinion that it is unnecessary to read § 1370(2) in a strained manner. The meaning of that section is clear. Nothing in the act is to be "construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (*including boundary waters*) of such States." (Emphasis supplied.) If Congress had intended to allow the states to have control over waters inside their boundaries only, then it would not have been necessary to have made any reference to "boundary waters."

33 U.S.C. § 1365(e) provides: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." The Seventh Circuit held that this language preserved only "a statute or common law of the state in which the discharge occurs." 731 F.2d at 414. Again, we find ourselves in disagreement with the Seventh Circuit. The plain meaning of this section is that nothing in § 1365 "shall restrict *any* right which any person . . . may have under *any* statute or common law." (Em-

phasis supplied.) Section 1365(e) is clear. To restrict the meaning of § 1365(e) again takes a strained reading of the act.

We find nothing in the CWA to remotely suggest that Congress intended to preempt the states' perogatives in the field of water pollution. In fact, the opposite is true. The states are invited, and we think encouraged, to adopt water quality standards more stringent than those set by the Federal Government under the act.

We agree with the Chancellor that "[a]n ordinary and reasonable reading of the Clean Water Act" can lead to but one conclusion and that is, it "does not preempt the State of Tennessee from bringing . . . [suit] under the Tennessee Water Quality Control Act of 1977, Tenn. Code Ann. § 69-3-101, *et seq.*, and the nuisance laws of [Tennessee]."

The judgment of the Chancellor is affirmed with costs assessed against Champion and the cause remanded to the Trial Court for the collection of costs and further necessary proceedings.

/s/ Samuel L. Lewis, Judge

CONCUR:

/s/ Henry F. Todd, Presiding Judge, M.S.

/s/ Ben H. Cantrell, Judge

APPENDIX C

33 U.S.C. § 1251(a) and (b)

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1370

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

APPENDIX D

T.C.A. § 69-3-105(a)(1)

69-3-105. Duties and authority of the board. - (a) The board shall have and exercise the power, duty, and responsibility to establish and adopt standards of quality for all waters of the state.

(1) The general assembly recognizes that due to various factors, no single standard of quality and purity is applicable to all waters of the state or to different segments of the same waters. The board shall classify all waters of the state and adopt water quality standards pursuant to such classifications. Such classifications shall be made in accordance with the declaration of policy and purpose in § 69-3-102. In preparing the classification of waters and the standards mentioned above, the board shall give consideration to:

(A) The size, depth, surface area covered, volume, direction, and rate of flow, stream gradient, and temperature of the water;

(B) The character of the land bordering, overlying or underlying the waters of the state and its particular suitability for particular uses, with a view to conserving the value of that land, encouraging the most appropriate use of the same for economic, residential, agricultural, industrial, recreational and conservation purposes;

(C) The past, present, and potential uses of the waters for transportation, domestic and industrial consumption, recreation, fishing and fish culture, fire prevention, the disposal of sewage, industrial and other wastes, and other possible uses.

T.C.A. § 69-3-114

69-3-114. Causing pollution or refusing to furnish information. — (a) It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-103(21), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

(b) In addition, it shall be unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or to fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

(c) The plea of financial inability to prevent, abate, or control pollution shall not be a valid defense under the provisions of this part. [Acts 1971, ch. 164, § 13; 1972 (Adj. S.), ch. 631, § 2; 1977, ch. 366, § 1; T.C.A. § 70-336.]

T.C.A. § 69-3-115(a)(1)

69-3-115. Violations — Penalties. — (a)(1) Any person who does any of the following acts or omisions shall be subject to a civil penalty of up to ten thousand dollars ($10,000) per day for each day during which the act or omission continues or occurs:

(A) Violates an effluent standard or limitation or a water quality standard established under this part;

(B) Violates the terms or conditions of a permit;

(C) Fails to complete a filing requirement;

(D) Fails to allow or perform an entry, inspection, monitoring or reporting requirement;

(E) Violates a final determination or order of the board, panel, or commissioner;

(F) In the case of an industrial user of a publicly owned treatment works, fails to pay user or cost recovery charges or violates pretreatment standards or toxic effluent limitations established as a condition in the permit of the treatment works; or

(G) Violates any other provision of this part or any rule or regulation promulgated by the board.

T.C.A. § 69-3-117

69-3-117. Proceedings against violators — Injunctions. — The commissioner may initiate proceedings in the chancery court of Davidson County or the county in which the activities occurred against any person who is alleged to have violated or is about to violate this part, conditions of permits issued under this part, the rules and regulations of the board or orders of the board or commissioner. In such action the commissioner may seek, and the court may grant, injunctive relief and any other relief available in law or equity. Specifically, the commissioner may seek injunctive relief against industrial users of publicly owned treatment works who fail to pay user or cost recovery charges or who violate pretreatment standards or toxic effluent limitations established as a condition to the permit of the treatment works. [Acts 1971, ch. 164, § 16; 1972 (Adj. S.), ch. 444, § 1; 1977, ch. 366, § 1; 1979, ch. 422, § 22; T.C.a., § 70-339; Acts 1984, ch. 804, § 9.]

APPENDIX E

Rule No. 1200-4-4-.01(10)

STREAM USE CLASSIFICATION FOR
INTERSTATE AND INTRASTATE STREAMS

CHAPTER 1200-4-4

(10) FRENCH BROAD RIVER BASIN

STREAM	DESCRIPTION	DOM	IND	FISH	REC	IRR	LW&W	NAV
French Broad River	*Mile 0.0 to 102.2 (North Carolina-Tennessee Line)*	●	●	●	●	●	●	
Hines Creek	Mile 0.0 to Origin		●	●	●	●	●	
Unnamed Tributary	At Hines Creek (Mile 1.7)			●			●	
Unnamed Tributary	At Hines Creek (Mile 3.7)			●			●	
Cement Mill Creek	Mile 0.0 to Origin		●	●	●	●	●	
Boyds Creek	Mile 0.0 to Origin		●	●	●	●	●	
Unnamed Tributary	At Boyds Creek (Mile 9.7)			●			●	
Unnamed Tributary	at Boyds Creek (Mile 11.5)			●			●	
Little Pigeon River	*Mile 0.0 to 2.9*	●	●	●	●	●	●	
Gist (Guess) Creek	Mile 0.0 to Origin			●	●	●	●	
Little Pigeon River	*Mile 2.9 to 4.8*		●	●	●	●	●	
W.F. Little Pigeon River	*Mile 0.0 to 7.9*	●	●	●	●	●	●	
W.F. Little Pigeon River	*Mile 7.9 to 8.8*		●	●	●	●	●	
W.F. Little Pigeon River	*Mile 8.8 to 13.0*	●	●	●	●	●	●	
W.F. Little Pigeon River	*Mile 13.0 to 19.0*		●	●	●	●	●	
W.F. Little Pigeon River	*Mile 19.0 to Origin*	●	●	●	●	●	●	
Little Pigeon River	*Mile 4.8 to Origin*	●	●	●	●	●	●	
E.F. Little Pigeon River	*Mile 0.0 to Origin*	●	●	●	●	●	●	